MOTION FILED
DEC 13 1979

79-6691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. [redacted]

DAWSON CHEMICAL COMPANY,
CRYSTAL MANUFACTURING CORPORATION,
CRYSTAL CHEMICAL COMPANY,
AND HELENA CHEMICAL COMPANY,
Petitioners,

v.

ROHM AND HAAS COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND ATTACHED BRIEF ON BEHALF OF THE PESTICIDE PRODUCERS ASSOCIATION AS *AMICUS CURIAE*

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-699

DAWSON CHEMICAL COMPANY,
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The Pesticide Producers Association (PPA) respectfully moves this Court, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, for leave t file the attached brief as *amicus curiae* in the above-captioned case.

Counsel for Petitioners has consented to the filing of the attached brief. Solicitation of consent of the Respondent was deemed futile as it has refused the request of the other organizations similarly situated.

The PPA is an organization of agricultural chemical formulators representing pesticide producers in and around the United States. From its inception, PPA

has had as one of its primary objectives, and has been active in, the promotion of formulators' positions on legislative and administrative actions which affect their business. In this regard, PPA's functions include (1) serving as a clearinghouse for the collection and dissemination of agricultural pesticide information helpful to its members; and (2) providing a forum for the exchange of ideas between and among its members.

The PPA has a keen interest in representing its members' rights. As shown in the attached brief, the opinion of the Court below, if allowed to stand, goes far in thwarting this interest and, additionally, has potential adverse consequences for the public as consumers of pesticide products, and the general business community.

The circumstances of this case provide an excellent opportunity for this Court to decide an important and complex question of law having an impact on the agricultural pesticide industry—and other extents far beyond the interests of the parties. PPA urges, therefore, that the Court take advantage of this opportunity by granting the Petitioners' request to issue a Writ of Certiorari to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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BRIEF ON BEHALF OF THE PESTICIDE PRODUCERS ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

The Pesticide Producers Association (the Association) is a non-profit membership corporation organized under the laws of the District of Columbia. The Association is comprised of twenty-three (23) companies, all of whom are producers, formulators, distributors, or marketers of pesticides. The term "pesticides" comprises agricultural chemicals such as herbicides, fungicides, insecticides and plant growth regulators.

The members of the Association are primarily small to medium size manufacturers, distributors and marketers of pesticides. These companies provide a valuable service to the agricultural community by supplying adequate quantities of many unpatented pesticides at relatively low prices. They are able to supply such chemicals at lower prices than larger, more complex corporations because their lower overhead and other expenses allow sales at a lower gross profit margin. Few of the members of the Association have extensive research and development organizations, so they are seldom able to exert monopolistic control through patents on their products. As a result, these companies exist almost entirely for the marketing of pesticides which are not protected by patent.

The interest of the members of this Association therefore transcends the interest of the parties to this action. The issue presented by the present Petition is whether the owner of a patent on a method for using an unpatented chemical has the right to retain for itself, to the exclusion of all others, the marketing of that unpatented chemical. If the decision of the Fifth Circuit Court of Appeals is allowed to stand, this may have a serious effect in the future on the right of member companies of the Association to market unpatented chemicals. Certainly the rule announced by the Fifth Circuit Court of Appeals will have a significant and adverse effect upon the right of these companies to add new products to their present lines.

A major problem which will occur is that whenever any patent is issued covering a method of use of a chemical, members of this Association will be unable to determine from the patent itself whether they have a right to manufacture and market the chemical. Under

the rule of the Fifth Circuit, this can only be determined by first ascertaining whether there is any other substantial use for the chemical. It will be apparent that obtaining the answer to this question can, in and of itself, be a long and costly process. Thus the decision of the Fifth Circuit Court of Appeals could provide an effective monopoly even over staple materials which are capable of substantial non-infringing uses.

REASONS FOR GRANTING THE WRIT

It is apparent that the Question presented in the Petition for Writ of Certiorari has significant public interest implications affecting far more businesses and people than the litigants or even the members of this Association.

The Constitution authorized and Congress designed the Patent System as an incentive to innovation that would give individuals and firms, for a limited period of time, the exclusive right to the value of their inventions. Under the Patent System such exclusive right may be granted to anyone who discovers "any new and useful process, machine, manufacture, or composition of matter" (35 U.S.C. § 101). Thus, an inventor of a new and useful chemical may be entitled to a composition of matter patent, and the inventor of a new and useful process may be entitled to a process patent. However, the law does not allow an inventor of a process a patent on the chemical used in that process. Nor, in the absence of a clear indication of Congressional intention, should a patent on that process be construed to give an exclusive right to market the chemical.

The logic of this conclusion becomes most apparent under the facts of the present case, in which the patent

on the chemical propanil was granted to Monsanto Company as a result of Monsanto's showing of propanil's "unusual and valuable herbicidal activity". *Monsanto Company* v. *Rohm and Haas Company,* 456 F.2d 592, 596 (3 Cir. 1971). Having been successful in the invalidation of that patent on the composition of matter, Rohm and Haas here seeks substantially the same protection under its patent on the process in which that same propanil is used as a herbicide.

Such an expanded monopoly is not justifiable on the ground that it would be impractical for Rohm and Haas to profit from its patent in any other way. This argument was decisively rejected by this Court in *B. B. Chemical Co.* v. *Ellis,* 314 U.S. 495, 498 (1941), and in *Mercoid Corp.* v. *Mid-Continent Investment Co.,* 320 U.S. 661, 666 (1944). As the Court stated in B. B. Chemical:

> The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant. (314 U.S. at 498.)

In any event, there are various ways that inventors of processes for using unpatented chemicals may profit, and thereby recoup their investment in the development of those new processes. Thus such inventors may practice the patented processes themselves, or they may license others to do so and obtain a royalty. They can market the unpatented chemicals used in the practice of the patented processes and include an expressed or an implied license with the purchase of the chemicals. However, for the reasons stated in the Petition for Writ of Certiorari, such patent owners should not

be allowed to use these rights in such a way as to monopolize the unpatented chemicals.

Even though the decision of the Fifth Circuit Court of Appeals is contrary to numerous pronouncements of this Court, it will be relied upon by many patentees of process and combination inventions as approving their monopolization of materials and elements used in their inventions, because no previous decision of this Court has specifically dealt with the effect of 35 U.S.C. § 271(d) on the patent misuse doctrine. Those who compete with these patentees need to have this question answered at this time, before they risk capital investment, expensive infringement suits and possible injunction and damages assessment. A failure to deal with this issue now may mean that such investments will not be made, so these patentees will have their monopolies by default.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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